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No. 08-322

In The Supreme Court of the United States

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE,

Appellant,

v.

ERIC H. HOLDER, JR., Attorney General of the United States of America, et al.,

Appellees.

On Appeal From The United States District Court For The District Of Columbia

BRIEF OF *AMICI CURIAE* THE NAVAJO NATION, ANTHONY WOUNDED HEAD, SR., IVAN STARR, OLIVER J. SEMANS, SR., AND DAN MCCOOL, IN SUPPORT OF APPELLEES [IMPACT ON AMERICAN INDIANS]

MARVIN S. COHEN*
JUDITH M. DWORKIN
SACKS TIERNEY P.A.**
4250 North Drinkwater Blvd.
Fourth Floor
Scottsdale, AZ 85251
(480) 425-2600

LOUIS DENETSOSIE,
Attorney General***
NAVAJO NATION DEPARTMENT OF JUSTICE
P. O. Box 2010
Window Rock, AZ 86515
(928) 871-2675

PATRICIA A. FERGUSON-BOHNEE
INDIAN LEGAL CLINIC**
SANDRA DAY O'CONNOR COLLEGE OF LAW
P. O. Box 877906
Tempe, AZ 85287
(480) 727-0420

**Counsel of Record*
***Counsel for Amici Curiae*
****Counsel for Amicus Curiae Navajo Nation*

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INTEREST OF THE *AMICI CURIAE*[1]

Amicus Navajo Nation is a federally recognized Indian tribe and is the largest tribe in the United States, comprising over 250,000 members and occupying approximately 25,000 square miles of trust lands within Arizona, New Mexico, and Utah.[2] The State of Arizona and political subdivisions of the Arizona portion of the Navajo Nation are required to submit voting changes for preclearance under Section 5 of the Voting Rights Act. The Navajo Nation has been involved in a number of voting rights lawsuits to ensure that its members can participate in the electoral process. The Navajo Nation and its members sent letters to Congress in support of the reauthorization of the expiring provisions of the Voting Rights Act.

Amicus Oliver J. Semans, Sr., is a member of the Rosebud Sioux Nation and lives on the Rosebud Sioux Reservation located in Todd County, South Dakota – a jurisdiction subject to Section 5's preclearance

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[1] Counsel of record for the parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, *amici curiae* certify that no counsel for a party authored this brief in whole or in part, and no persons or entity, other than *amici curiae* and their counsel, made a financial contribution for the preparation or submission of this brief.

[2] According to the 2000 U.S. Census, approximately 180,000 individuals live on the Navajo Reservation, approximately 97% of whom are American Indian. U.S. Census Bureau, NAVAJO RESERVATION DEMOGRAPHIC PROFILE: 2000, Table DP-1, *available at* http://censtats.census.gov/data/US/502430.pdf.

requirements. Mr. Semans has organized Get Out the Vote Campaigns in South Dakota for tribal voters. Mr. Semans testified at a hearing in Rapid City, South Dakota in support of the reauthorization of the Voting Rights Act. Mr. Semans served as a field director for a nonprofit group focused on Indian voter registration and rights. He has testified extensively before South Dakota State Senate Committees on proposed laws that would adversely affect the voting rights of American Indians. Mr. Semans has continuously worked on increasing voter turnout throughout the State of South Dakota and contributed to the 117% increase in voter participation of Indians during the 2004 elections.

Amici Anthony Wounded Head, Sr. and Ivan Starr are tribal council representatives of the Oglala Sioux Tribe of the Pine Ridge Indian Reservation located in Shannon and Jackson Counties in South Dakota. The Pine Ridge Reservation is one of the poorest areas in the country.[3] Mr. Wounded Head and Mr. Starr are native language speakers and are supportive of language translations for American

[3] The Pine Ridge Reservation is located in Shannon and Jackson counties. Shannon County has the highest Indian population of any county in the United States at 94.2 percent, and is the "second-poorest county nationwide." The poorest county is in Buffalo County, South Dakota and has an 81.6% Indian population. *Voting Rights Act: Evidence of Continued Need, Vol. II: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 109th Cong. 2019 (2006) (appendix to the statement of Wade Henderson).

Indian language speakers during elections. *Amici* have witnessed the impacts of Section 5 in Shannon County for reservation voters.

Amicus Dan McCool is a Professor of Political Science at the University of Utah. Professor McCool's research focuses on water rights and voting rights, and he served as a consultant for the ACLU's Native Vote Project. Professor McCool testified at the National Commission for Voting Rights Hearing held in Rapid City, South Dakota in 2005 providing evidence to support the reauthorization of Section 5 of the Voting Rights Act. He has appeared as an expert witness in several Indian voting rights cases and has written and published extensively on the subject. Professor McCool is a co-author of NATIVE VOTE: AMERICAN INDIANS, THE VOTING RIGHTS ACT, AND THE RIGHT TO VOTE (2007).

The Navajo Nation, and individuals Semans, Wounded Head, Starr and McCool file this brief as *amici curiae* in support of the right to vote of American Indians, particularly elders and others who continue to live traditional lifestyles in small communities in rural and remote areas where they continue to speak traditional American Indian languages and face the impacts of past discrimination in the areas of health, education, and voting.

Amici agree with Appellees that Congress' 2006 reauthorization of the Voting Rights Act was constitutional. Moreover, *Amici* are concerned that if the Court declares that the reauthorization of Section 5 is

unconstitutional, American Indian voting rights will be significantly impacted and result in a reversal of the strides made in recent years to ensure greater Indian voter participation. This would negatively impact many American Indian voters who only recently secured the right to vote, continue to face discrimination in voting, and who cannot shoulder the financial burden to bring lawsuits under Section 2 of the Voting Rights Act.

ARGUMENT

I. AMERICAN INDIANS HAVE HISTORICALLY BEEN SUBJECT TO PURPOSEFUL DISCRIMINATION THAT HAS DENIED THEIR RIGHT TO VOTE IN STATE AND FEDERAL ELECTIONS.

American Indians "have experienced a long history of disenfranchisement as a matter of law and of practice."[4] It was not until Congress passed the Indian Citizenship Act of 1924 that all American Indians were granted United States citizenship.[5] Prior to 1924, Indians were denied citizenship and the right to vote based on the underlying trust

[4] *Continuing Need for Section 203's Provision for Limited English Proficient Voters: Hearing Before the S. Comm. on the Judiciary,* 109th Cong. 309 (2006) (letter from Joe Garcia, NCAI).

[5] An Act of June 2, 1924, 43 Stat. 253, Pub. L. 175 (1924) (codified as amended at 8 U.S.C. § 1401(b)).

relationship between the federal government and the tribes and on their status as citizens of their tribes. Until the 1924 Indian Citizenship Act, Indians could only become citizens through naturalization "by or under some treaty or statute."[6] Enactment of the 1924 Act ended the period in United States history in which United States citizenship of Indians conditioned on severance of tribal ties and renunciation of tribal citizenship and assimilation into the dominant culture.[7]

By operation of the Fourteenth Amendment, an Indian who is a United States citizen is also a citizen of his or her state of residence.[8] Notwithstanding the passage of the Indian Citizenship Act, states continued to discriminate against Indians by denying them the right to vote in state and federal elections through the use of poll taxes, literacy tests, and intimidation.[9]

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[6] *Elk v. Wilkins*, 112 U.S. 94, 103 (1884).

[7] COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, § 14.01[3], n. 42-44. (2005 Ed.)

[8] U.S. CONST. amend. XIV, § 1.

[9] *Continuing Need for Section 203's Provision for Limited English Proficient Voters: Hearing Before the S. Comm. on the Judiciary,* 109th Cong. 309 (2006) (letter from Joe Garcia, NCAI).

A. Arizona Continued to Prevent Indians from Voting Notwithstanding Passage of the Indian Citizenship Act of 1924.

Even after 1924, Arizona Indians were prohibited from participating in elections. The Arizona Supreme Court upheld the prohibition finding that Indians living on reservations could not vote because they were wards of the federal government and, as such were "persons under guardianship" and thereby prohibited from voting in Arizona.[10] Reservation Indians in Arizona did not achieve the right to vote in state elections until 1948 when the Arizona Supreme Court overturned the *Porter v. Hall* decision.[11]

The State of Arizona continued its discrimination through its imposition of English literacy tests which were not repealed until 1972.[12] Only those Indians who could read the United States Constitution in English and write their names were eligible to vote in state elections. The enactment of the Voting Rights Act in 1965 included a temporary prohibition of literacy tests in covered jurisdictions. Apache County,

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[10] *Porter v. Hall*, 34 Ariz. 308, 331-332, 271 P. 411, 419 (Ariz. 1928).

[11] *Harrison v. Laveen*, 67 Ariz. 337, 196 P.2d 456 (Ariz. 1948) (holding that Indians living on Indian reservations should in all respects be allowed the right to vote).

[12] *See* ARIZ. REV. STAT. ANN. § 16-101(A)(4)-(5) (1956); *Voting Rights Act: Evidence of Continued Need, Vol. I: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 109th Cong. 1372 (2006) (appendix to the statement of Wade Henderson).

Arizona was included in the original list of jurisdictions covered by Section 5 of the Voting Rights Act.[13] On November 19, 1965, Navajo and Coconino Counties also became covered by Section 5.[14] As a result of this coverage, the Arizona literacy tests were suspended in each of these three counties. In 1966, these three counties became the first jurisdictions to successfully bail out from coverage under Section 5 after the U.S. District Court for the District of Columbia held that Arizona's literacy test had not been discriminatorily applied against Indians in the preceding five years.[15]

When the Voting Rights Act was amended in 1970, it included a nationwide ban on literacy tests, which again preempted the operation of Arizona's literacy tests.[16] Arizona became one of the states to unsuccessfully challenge the ban on literacy tests. In upholding the ban and striking down literacy tests, the Supreme Court noted that Arizona had "a serious problem of deficient voter registration among

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[13] Determination of the Attorney General Pursuant to Section 4(b)(1) of the Voting Rights Act of 1965, 30 Fed. Reg. 9897 (Aug. 7, 1965).

[14] Determination of the Director Pursuant to Section 4(b)(2) of the Voting Rights Act of 1965, 30 Fed. Reg. 14505 (Nov. 19, 1965).

[15] *Apache County v. United States,* 256 F. Supp. 903, 910-911 (D.D.C. 1966).

[16] The Voting Rights Act, 42 U.S.C. § 1973aa (1970) (current version at 42 U.S.C. § 1973b (2008)).

Indians."[17] The Court recognized that non-English speakers may make use of resources in their native languages in order to responsibly and knowledgeably cast a ballot.[18]

The Voting Rights Act amendments of 1970 included, as one of the measures of voting discrimination, registration and turnout in the 1968 presidential election. As a result, Apache, Coconino and Navajo Counties again became covered by Section 5 along with five (5) other Arizona counties.

Even after 1970, there were a number of challenges to Indians' right to vote and to hold office. Many of these cases challenged activities in Apache County, one of only a few counties within the United States in which the predominant languages spoken are American Indian. Of these languages, the most commonly used is Navajo, a historically unwritten language.[19] The Arizona Supreme Court quashed a permanent injunction by the lower court against the seating of Tom Shirley, a Navajo Indian living on the

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[17] *Oregon v. Mitchell*, 400 U.S. 112, 117, 132, 153 (1970).

[18] 400 U.S. at 146.

[19] Considering the Navajo Reservation as a whole, including parts of the States of Arizona, New Mexico and Utah, over one-third of the voting age citizens on the Navajo Nation Reservation are limited-English proficient and over one-quarter are illiterate. *Voting Rights Act: Evidence of Continued Need, Vol. I: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 109th Cong. 1403-1404 (2006) (appendix to the statement of Wade Henderson).

Navajo Reservation, who had been elected to the Apache County Board of Supervisors.[20] The Arizona Court reaffirmed the right of Indians to vote, vacated the injunction and directed the Apache County Board of Supervisors to certify Shirley as the elected supervisor from District 3.[21]

Apache County also discriminated against Indian voters by gerrymandering the districts for the three seats on the County's Board of Supervisors. In the early 1970's, Apache County District 3 had a population of 26,700 of whom 23,600 were Indian, while District 1 had a population of 1,700 of whom only 70 were Indian and District 2 had a population of 3,900 of whom only 300 were Indian. Several Indian voters challenged Apache County for violating the one-person, one-vote rule.[22] Apache County claimed that Indians are not citizens of the United States and the Indian Citizenship Act granting them citizenship was unconstitutional.[23] The three-judge federal court rejected the County's arguments, noted that the County must be redistricted in accordance with one-person, one-vote standards and granted plaintiff's motion for summary judgment.[24]

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[20] *Shirley v. Superior Court for Apache County*, 109 Ariz. 510, 516, 513 P.2d 939, 945 (Ariz. 1973).

[21] *Id.* at 516, 513 P.2d at 945.

[22] *Goodluck v. Apache County*, 417 F. Supp. 13, 14 (D. Ariz. 1975), *aff'd*, 429 U.S. 876 (1976).

[23] 417 F. Supp. at 14.

[24] 417 F. Supp. at 16.

In 1976, Apache County attempted to avoid integration of its public schools to include Indian students by holding a special bond election to fund a new school in the almost entirely non-Indian southern part of the county. Although the special election affected Indian students who would be denied equal schooling, Indian turnout for the election was abnormally low. Investigation demonstrated that the low turnout was a result of the closing of nearly half of the polling places on the reservation, the total lack of language assistance, the absence of Navajo language informational meetings regarding the bond election and the use of English-only in the implementation of absentee voting procedures. This litigation ended in a Consent Decree in which Apache County agreed to a number of changes to the blatant discrimination in voting practices.[25]

Nine Arizona counties are covered under Section 203 for American Indian languages: Apache, Coconino, Gila, Graham, Maricopa, Navajo, Pima, Pinal and Yuma and must provide all election materials, including assistance and ballots, in the language of the applicable language minority group.[26] Of these counties four – Navajo, Apache, Coconino and Pinal – are covered under Section 5 and must have all materials and procedures precleared.

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[25] *Apache County High School No. 90 v. United States,* No. 77-1815 (D.D.C. June 12, 1980).

[26] *See* Implementation of the Provisions of the Voting Rights Act Regarding Language Minorities, 28 C.F.R. § 55.8(a) (2009).

B. Racial Discrimination Against Indians Plague the Election Process in South Dakota, Specifically in Todd and Shannon Counties.

Like Arizona, South Dakota has had a long history of discrimination against American Indians. Todd and Shannon Counties have been the focus of much of the discrimination because the Rosebud Reservation is located in the former, and the Pine Ridge Reservation is in the latter.

The Sioux people of South Dakota have experienced a long struggle to attain full voting rights. The first territorial legislative assembly limited voting to whites. This provision was revoked after passage of the Civil Rights Amendments, but still limited voting to citizens, which excluded most Indians. The territorial civil code expressly prevented Indians from voting. The state's civil code, developed in 1903, specified that Indians could not vote or hold office while "maintaining tribal relations."[27] The state applied a culture test to voting, requiring Indians to abandon their identity, their culture, their language, and their homeland in order to vote. This provision was not repealed until 1951.[28]

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[27] DANIEL MCCOOL, SUSAN OLSON, AND JENNIFER ROBINSON, NATIVE VOTE: AMERICAN INDIANS, THE VOTING RIGHTS ACT, AND THE RIGHT TO VOTE 137-138 (Cambridge University Press 2007).

[28] *Id.* at 28.

The repeal of this provision did not automatically result in full voting rights for Indians living in Todd and Shannon Counties. Indians living in these two counties were prohibited from voting for the county officials who governed them. This injustice was finally ended by the Eighth Circuit Court of Appeals in 1975.[29] However, South Dakota still forbade Indians from Todd and Shannon Counties from holding office; that injustice was not struck down until 1980.[30]

In 1976, the counties of Todd and Shannon were placed under the provisions of Section 5 of the Voting Rights Act.[31] The Attorney General of South Dakota, William Janklow, directed the South Dakota Secretary of State to virtually ignore the Voting Rights Act provisions that were "plaguing" the state.[32]

The continuing racial animosities in South Dakota have resulted in a series of reports by the U.S. Commission on Civil Rights. In 1977, the Commission

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[29] *Little Thunder v. South Dakota*, 518 F.2d 1253, 1258 (8th Cir. 1975).

[30] *United States v. South Dakota*, 636 F.2d 241, 243 (8th Cir. 1980).

[31] Partial List of Determinations Pursuant to Voting Rights Act of 1965, as Amended, 41 Fed. Reg. 784 (Jan. 5, 1976): *Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 109th Cong. 1990 (2006) (appendix to the statement of Wade Henderson).

[32] *Voting Rights Act: Evidence of Continued Need, Vol. II: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 109th Cong. 1990 (2006) (appendix to the statement of Wade Henderson).

noted that the "voting problems of minorities" in South Dakota were part of the state's "unfinished business in the area of civil rights."[33] In 1981 the Commission again turned its attention to South Dakota to investigate the voting problems of American Indians. Much of this report focused on Todd and Shannon Counties.

II. WHILE THE PROTECTIONS OF SECTION 5 OF THE VOTING RIGHTS ACT HAVE IMPROVED VOTING FOR INDIAN VOTERS, DISCRIMINATION HAS NOT BEEN ERADICATED.

The expiring provisions of the Voting Rights Act include (i) Section 4(b)(4), (ii) Section 5 preclearance, (iii) Section 203 – bilingual elections for American Indians, Asian Americans, Alaska Natives and Spanish heritage speakers who are limited English proficient (LEP), (iv) Section 6 – federal election examiners, and (v) Section 8 – federal election observers. The Voting Rights Act, including the Section 5 preclearance requirement and the minority language provisions, provides necessary protections to American Indian voters from ongoing discrimination. Congress implemented Section 203 of the Voting Rights Act in 1975 based on findings that American

[33] U.S. COMM'N ON CIVIL RIGHTS. THE UNFINISHED BUSINESS: TWENTY YEARS LATER, A REPORT SUBMITTED TO THE U.S. COMMISSION ON CIVIL RIGHTS BY ITS FIFTY-ONE STATE ADVISORY COMMITTEE. (1977).

Indians, Alaska Natives and other language minorities were prohibited from fully participating in the democratic process.[34] However, even with implementation of Section 5, Section 4(f)(4), and Section 203 protections, the provisions do not provide absolute protection for American Indian voters. Congressional testimony and materials submitted in support of reauthorization of the expiring provisions of the Voting Rights Act demonstrate numerous instances where American Indians have been subject to discrimination since 1982.

In support of reauthorization of Section 5, the House of Representatives Committee to the Judiciary received testimony that revealed a need to extend the temporary and expiring provisions of the Voting Rights Act to protect racial and language minority citizens from discrimination.[35] Laughlin McDonald of the ACLU testified that "there is in fact, abundant modern-day evidence showing that section 5 is still needed in this country and that the right to vote is still in jeopardy,"[36] because there is widespread,

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[34] *Voting Rights Act: Section 203 – Bilingual Election Requirements (Part II): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 109th Cong. 4 (2005) (testimony of Jacqueline Johnson, National Congress of American Indians).

[35] H.R. REP. NO. 109-478, at 56 (2006).

[36] *Voting Rights Act: The Continuing Need for Section 5: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 109th Cong. 4 (2005) (testimony of Laughlin McDonald).

systematic voting discrimination against American Indians.[37] The House Committee Report found that Section 5 enforcement authority was critical, because it allowed the Department of Justice and private citizens to monitor covered jurisdictions with a history of discrimination to ensure full compliance of the law.[38] The Committee ultimately found that "substantial discrimination continue[d] to exist in 2006."[39] The Congressional Record supports the Committee's finding and the Congressional reauthorization of Section 5.

A. American Indians Are Disenfranchised by Voting Schemes.

Recent instances of voting discrimination in Indian Country documented in the Congressional Record indicate that the Section 5 preclearance protection of the Voting Rights Act is still necessary to protect American Indian voters. The House Committee Report found that American Indian citizens were subject to voting schemes that prevent American Indians from gaining majority seats by dismantling minority districts.[40] The Committee Report also

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[37] *Id.* at 101. (appendix to the statement of Laughlin McDonald).

[38] H.R. REP. NO. 109-478, at 42 (2006).

[39] *Id.* at 25.

[40] *Id.* at 45.

found that similar tactics kept American Indians from registering and casting effective ballots.[41]

In Northern Arizona, there is extensive history of discrimination against Navajo, Apache, and Hopi voters.[42] Since 1982, there have been two successful cases against the Section 5 covered Counties of Coconino, Navajo, and Apache compelling enforcement of the Voting Rights Act.[43] In 1989, the United States brought forth a claim against Arizona for "unlawfully deny[ing] or abridg[ing] the voting rights of Navajo citizens residing in defendant counties."[44] The Arizona counties settled the claims by consent decree which required the establishment of the Navajo Language Election Information Program including the employment of outreach workers to assist in all aspects of voting by Indian voters.[45] In 1994, Coconino County created two new Superior Court judgeships without seeking preclearance under Section 5. The District

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[41] *Id.*

[42] *Voting Rights Act: Evidence of Continued Need, Vol. I: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 109th Cong. 1379 (2006) (appendix to the statement of Wade Henderson).

[43] *Id.*

[44] *United States v. State of Arizona*, Civ. No. 88-1989 (D. Ariz. May 22, 1989) (Consent Decree) (as amended Sept. 7, 1993); *Voting Rights Act: Section 203 – Bilingual Election Requirements (Part I): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 109th Cong. 99 (2005) (appendix to the statement of Bradley J. Schlozman).

[45] *Id.* (appendix to the Statement of Bradley J. Schlozman).

Court held that the judgeships constituted "covered change" and enjoined the judicial election until preclearance was obtained.[46]

American Indian voters in South Dakota continue to encounter racial hostility, polarized voting, and resistance when participating in state and federal elections. Between 1982 and 2006, American Indians in South Dakota were subject to *de jure* and *de facto* discrimination, including having their voter registration cards systematically denied by the county registrar[47] and not being able to vote in elections because they were non-white land owners.[48] There have been nineteen Indian voting rights cases brought against South Dakota; out of those cases, eighteen were decided in favor of the Indian plaintiffs or were settled with the agreement of the Indian plaintiffs.[49] Continued discrimination in South

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[46] *Voting Rights Act: Evidence of Continued Need, Vol. I: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 109th Cong. 1411-1412 (2006) (appendix to the statement of Wade Henderson).

[47] *American Horse v. Kundert*, Civ. No. 84-5159 (D.S.D. Nov. 5, 1984).

[48] *United States v. Day County*, No. 85-3050 (D.S.D. Oct. 24, 1986); *Voting Rights Act: Evidence of Continued Need, Vol. II: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 109th Cong. 2000 (2006) (appendix to the statement of Wade Henderson).

[49] *Voting Rights Act: Section 203 – Bilingual Election Requirements (Part II): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 109th Cong. 264 (2006).

Dakota necessitates federal oversight over Shannon and Todd counties through the preclearance protections of Section 5.

American Indians in both Arizona and South Dakota have been subject to voting schemes that aim to dilute or pack the Indian vote. In *Goddard v. Babbitt*, the San Carlos Apache Tribe successfully objected to proposed redistricting in 1982 that aimed to split and dilute the Apache vote.[50] The Department of Justice objected to the plan on the grounds that the plan had a discriminatory effect. According to the District Court, the proposed plan "has the effect of diluting the San Carlos Apache Tribal voting strength and dividing the Apache community of interest."[51]

In two South Dakota cases not covered by Section 5 preclearance protection, discrimination in redistricting led to prolonged litigation followed by consent decrees. In *Kirkie v. Buffalo County,* Buffalo County, South Dakota gerrymandered its three districts by packing 75% of the Indian population into one district.[52] The county, the "poorest in the

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[50] *Goddard v. Babbitt*, 536 F. Supp 538, 541 (D. Ariz. 1982); *Voting Rights Act: Evidence of Continued Need, Vol. III: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 109th Cong. 3968 (2006) (materials submitted by the Honorable Steve Chabot).

[51] *Id.*

[52] *Kirkie v. Buffalo County*, Civ. No. 03-3011 (D.S.D. Feb. 12, 2004) (Consent Decree); *Voting Rights Act: The Continuing Need for Section 5: Hearing Before the Subcomm. on the Constitution*

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country,"[53] was comprised of approximately 2,100 people, of which 83% were American Indian. This redistricting had been implemented with the purpose of diluting the Indian vote, as whites controlled both the other two districts and thus County government.[54] The case was settled by a consent decree wherein the county admitted its plan was discriminatory and was forced to redraw the district lines.[55] Pursuant to the consent decree, the county agreed to subject itself to Section 3(c) of the Voting Rights Act, which requires the submission of voting changes for preclearance.[56] As recent as 2005, another South Dakota county was forced to redraw district lines for similar malapportionment of Indian voters.[57] Section 5 protections

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of the H. Comm. on the Judiciary, 109th Cong. 132-133 (2005) (appendix to the statement of Laughlin McDonald).

[53] *Voting Rights Act: Evidence of Continued Need, Vol. II: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 109th Cong. 2019 (2006) (appendix to the statement of Wade Henderson).

[54] *Kirkie v. Buffalo County*, Civ. No. 03-3011 (D.S.D. Feb. 12, 2004) (Consent Decree); *Voting Rights Act: The Continuing Need for Section 5: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 109th Cong. 132-133 (2005) (appendix to the statement of Laughlin McDonald).

[55] *Id.*

[56] *Voting Rights Act: Evidence of Continued Need, Vol. II: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 109th Cong. 2005 (2006) (appendix to the statement of Wade Henderson).

[57] *Blackmoon v. Charles Mix County*, No. 05-4017 (D.S.D. 2004); *Voting Rights Act: The Continuing Need for Section 5: Hearing Before the Subcomm. on the Constitution of the H.*

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could have prevented this type of *de facto* discrimination, because the changes would have needed preclearance approval prior to enactment.[58]

B. States Have Used Geography to Disenfranchise Indian Voters.

The Congressional Record demonstrates how South Dakota and Arizona have employed geography to decrease voter turnout on reservations. In Arizona, polling locations and voter registration sites on reservations are often located at substantially greater distances from voters than sites located off reservation.[59] Further distances means a greater cost incurred to exercise one's vote.[60] Registering to vote is also an obstacle as a majority of counties bordering reservations limit registration locations to off-reservation towns.[61] In South Dakota, one county failed to provide sufficient polling locations for a school district election. Many Indian voters traveled

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Comm. on the Judiciary, 109th Cong. 156 (2005) (appendix to the Statement of Laughlin McDonald).

[58] Charles Mix County is not covered by Section 5.

[59] *Voting Rights Act: Evidence of Continued Need, Vol. I: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 109th Cong. 1380, 1411-1412 (2006) (appendix to the statement of Wade Henderson).

[60] *Id.*

[61] *Id.*

up to 150 miles to vote.[62] Only after a federal district court entered a judgment against the County did the County provide additional reservation polling places.[63]

In South Dakota, a hearing in support of a bill to create more on-reservation polling places was scheduled 3 hours away from the reservation at 7:30 a.m., which made it difficult for tribal members to attend and testify.[64] The bill was subsequently defeated. In 2000, the U.S. Commission on Civil Rights noted that "Native Americans do not fully participate in local, state, and federal elections. This absence from the electoral process results in a lack of political representation at all levels of government and helps to ensure the continued neglect and inattention to issues of disparity and inequality" in South Dakota.[65]

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[62] *Black Bull v. Dupree School District*, Civ. No. 86-3012 (D.S.D. May 14, 1986); *Voting Rights Act: The Continuing Need for Section 5: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 109th Cong. 133 (2005) (appendix to the statement of Laughlin McDonald).

[63] . *Black Bull v. Dupree School District*, Civ. No. 86-3012 (D.S.D. May, 14 1986).

[64] *Voting Rights Act: Evidence of Continued Need, Vol. II: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 109th Cong. 2027 (2006) (appendix to the statement of Wade Henderson).

[65] *Id.* at 1989.

C. Voter Intimidation at the Polls Disenfranchises American Indian Voters.

The Congressional Record provides evidence that voter intimidation tactics are still employed at various polling places in order to deter language minority voters. The Department of Justice reported instances where observers witnessed language minority voters being harassed and intimidated by polling officials.[66] Congressional testimony described the efforts to discourage the Indian vote by intimidating poll workers and voters at several polling locations on the Navajo Reservation in 2002.[67] In South Dakota, Indian voters have been intimidated by accusations of voter fraud by local officials – that, in turn, created a racially hostile environment at the voter registration sites and voting polls.[68]

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[66] H.R. REP. NO. 109-478, at 45 (2006).

[67] *Voting Rights Act: Sections 6 and 8 – The Federal Examiner and Observer Program, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 109th Cong. 16 (2005) (statement of Penny Pew).

[68] *Voting Rights Act: Evidence of Continued Need, Vol. I: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 109th Cong. 2007 (2006) (appendix to the statement of Wade Henderson).

D. Section 5 Has Improved Voting Opportunities for Native Language Speakers in Covered Jurisdictions.

Because language has been a significant barrier to voting for American Indians, Section 5 provides equal access to the ballot by American Indians. The House Committee Report found that American Indians continue to experience hardships when attempting to vote, because of their limited ability to speak English and inability to read the ballots.[69] The National Congress of American Indians testified that there are many American Indians, especially elders, who "speak English only as a second language."[70] The illiteracy rate for Arizona Indians is nineteen times the national illiteracy rate.[71] For South Dakota Indians, the illiteracy rate is similarly very high and "[s]ignificant numbers of Indians" require oral and written translation assistance in the Lakota and Dakota languages.[72]

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[69] H.R. REP. NO. 109-478, at 45 (2006).

[70] *Id*. at 46; *Continuing Need for Section 203's Provision for Limited English Proficient Voters: Hearing Before the S. Comm. on the Judiciary,* 109th Cong. 309 (2006) (letter by Joe Garcia, NCAI).

[71] *Voting Rights Act: Evidence of Continued Need, Vol. I: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 109th Cong. 1367 (2006) (appendix to the statement of Wade Henderson).

[72] *Voting Rights Act: The Continuing Need for Section 5: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 109th Cong. 2020-2091 (2005) (appendix to the statement of Laughlin McDonald).

The Department of Justice identified situations in which ineffective language assistance was provided to American Indian voters in the Section 5 covered jurisdictions in Northern Arizona.[73] Navajo and Apache Counties agreed to establish minority language programs to better assist Indian voters as a result of the Department of Justice's efforts.[74] Preclearance under Section 5 ensures that ineffective language assistance will not recur because changes to the election procedures must be precleared.

Congressional testimony revealed that American Indians have historically had low voter participation rates. However, testimony from witnesses in Indian communities noted that participation rates have increased in some communities by as much as 50% to 150%.[75] The House Committee found sufficient evidence of increased participation by language minorities, including American Indians located in Section 5 jurisdictions.[76]

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[73] *Voting Rights Act: Evidence of Continued Need, Vol. I: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 109th Cong. 1367 (2006) (appendix to the statement of Wade Henderson).

[74] *United States v. State of Arizona*, Civ. No. 88-1989 (D. Ariz. May 22, 1989) (Consent Decree) (as amended Sept. 7, 1993); *Voting Rights Act: Section 203 – Bilingual Election Requirements (Part I): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 109th Cong. 99 (2005) (appendix to the statement of Bradley J. Schlozman).

[75] H.R. REP. NO. 109-478, at 20 (2006).

[76] *Id*.

Continuation of the protections provided by Section 5 is vital for maintaining and increasing American Indian voter participation. The report on American Indian and Alaska Native progress concluded with the Committee stating, "[t]he Committee believes that these examples reflect the gains that Congress intended language minorities to make under Section 4(f) and 203, and concludes that all American citizens should have the opportunity to participate in the political process."[77] Section 5 of the Voting Rights Act continues to be a critical element in ensuring the ability of Native language speakers the opportunity to knowingly exercise their electoral franchise.

III. SECTION 5 PRECLEARANCE IS A KEY COMPONENT TO PROTECTING THE FUNDAMENTAL RIGHTS OF AMERICAN INDIANS.

In *Thornburg v. Gingles*, the Supreme Court stated that "[b]oth this Court and other federal courts have recognized that political participation by minorities tends to be depressed where minority group members suffer effects of prior discrimination such as inferior education, poor employment opportunities, and low incomes."[78] Indian voters continue to suffer

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[77] *Id.*

[78] 478 U.S. 30, 69 (1986); *Voting Rights Act: Evidence of Continued Need, Vol. II: Hearing Before the Subcomm. on the*

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from some of the highest poverty rates and unemployment rates in the country. Many Indian reservations are rural. In Shannon County, which includes the Pine Ridge Reservation, 52.3% of the families are below the poverty line, and in Todd County, which includes the Rosebud Sioux Reservation, 48.3% of the families live below the poverty line.[79] On Arizona tribal reservations, poverty rates are above 42% with Fort Yuma's rate exceeding 94%.[80] The need for Section 5's preclearance provisions in Indian Country is demonstrated by not only the historical impediments to suppress the Indian vote, but the continuing effects of past discrimination and continuing voter suppression efforts that disenfranchise Indian voters.

A. Native American Voter Registration and Turnout Have Increased.

Seven counties are covered under Section 4(f)(4) for American Indian languages and are subject to the preclearance requirements of Section 5 including four in Arizona, two in South Dakota, and one in North

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Constitution of the H. Comm. on the Judiciary, 109th Cong. 2020 (2006) (appendix to the statement of Wade Henderson).

[79] *Id*.

[80] *Voting Rights Act: Evidence of Continued Need, Vol. I: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 1383 (2006) (appendix to the statement of Wade Henderson).

Carolina.[81] Counties subject to preclearance for American Indian languages have past histories of discrimination against Indians and include many limited English proficient speakers.

Prior to Section 5 coverage, American Indians in covered jurisdictions had little opportunity to vote. Section 5 of the Voting Rights Act has resulted in increased participation by Indian voters in the electoral process. The House Judiciary Committee found "that increased participation levels are directly attributable to the effectiveness of the VRA's expiring provisions."[82] The Committee also found that the temporary provisions have protected minority voters and helped them to register to vote unchallenged, cast ballots unhindered, and cast meaningful votes. More Indian voters have registered to vote and turned out to vote since the implementation of Section 5.[83]

B. The Evidence Reveals that There Is a Continued Need for Section 5.

Despite improvements, Indian voters still face obstacles in voting.[84] The need for the continuation of

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[81] "Section 5 Covered Jurisdictions," on the U.S. Dep't of Justice Civil Rights Division website, *available at* http://www.usdoj.gov/crt/voting/sec_5/covered.php.

[82] H.R. REP. NO. 109-478, at 21.

[83] *Id*. at 20.

[84] H.R. REP. NO. 109-478, at 34, 35, 45, 52.

Section 5 was demonstrated by noncompliance, continuing discrimination, consent decrees entered in Arizona and South Dakota for covered jurisdictions as late as 1993 and 2005, and the number of voting cases in Indian Country. From 1999-2005, South Dakota was involved in seven cases regarding violations of Indian voting rights.[85]

Section 5 has improved the political landscape for tribal participation in elections, but it has not eroded animosity against Indian voters nor has it ended all discrimination in voting. In the Renew the Voting Rights Act Report for Arizona, experts found that Arizona still needs to make a lot of progress for Indian voters.

> More than eighty percent of Arizona's twenty-two Section 5 objections have occurred for voting changes enacted since 1982. Four post-1982 objections have been for statewide redistricting plans, including one in the 1980s, two in the 1990s and one as recently as 2002. Since 1982, the Department of Justice has interposed objections to voting changes from nearly half of Arizona's 15 counties that have had the purpose or effect

[85] *Voting Rights Act: Section 203 – Bilingual Election Requirements (Part II): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 109th Cong. 259-268 (2005) (materials submitted by Rep. Chabot).

of discriminating against Latino or American Indian voters.[86]

The Indian voters in covered jurisdictions comprise a substantial percentage of the Voting Age Population in those counties. (Todd County, 85.6%; Shannon County, 94.2%; Apache County, 76.88%; Navajo County, 47.74; Coconino County, 28.51%; Jackson County, NC, 10.2%; Pinal County, 6.1%). Therefore, the Indian vote poses a significant threat to the non-Indian voters located in the same political jurisdictions. For these reasons, efforts have been made to suppress the Indian vote.

In this century, Indian voters have been able to ensure the success of candidates in several prominent elections. Recent successes for Indian voters include the 2002 Senate election in South Dakota, in which there was a huge increase in reservation turnout, and Senator Tim Johnson barely won re-election by only 524 votes. In Washington state, a surge of Indian votes ensured Senator Maria Cantwell's narrow win in 2000. In Arizona, reservation voters helped elect Governor Janet Napolitano in 2002.

Successes in Indian voting and threats of Indian voting strength have lead to attacks on Indian voting rights. Arizona and South Dakota passed voter

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[86] *Voting Rights Act: Evidence of Continued Need, Vol. I: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 1379 (2006) (appendix to the statement of Wade Henderson).

identification laws requiring identification when voting at the polls, restricting Indian voting rights.[87] Individuals testified that the South Dakota voter identification law was passed in response to the Indian voter turnout in 2002, which helped to elect Senator Johnson.[88] The voter identification law in Arizona resulted in a significant decrease in the number of Native Americans who voted during the 2006 elections.

In 2003, the speaker of the House for the Arizona State Legislature questioned whether a Navajo tribal member may serve as a member of the Commission on Appellate Court Appointments.[89] The specific request questioned "the ability of a member of a sovereign nation to participate 'in the selection process of judges to courts that this individual may not be subject to as a result of his tribe's status.'"[90] The Attorney General affirmed the ability of Indians to participate in all aspects of state government, including serving on court commissions.

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[87] ARIZ. REV. STAT. ANN. § 16-579; S.D. CODIFIED LAWS § 12-18-6.1.

[88] *To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 707-710 (2005) (statement of O.J. Semans); *Voting Rights Act: Evidence of Continued Need, Vol. I: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 109th Cong. 2026 (2006) (appendix to the statement of Wade Henderson).

[89] Ariz. Att'y Gen. Op. No. 103-007 (2003).

[90] *Id.* at 3.

Further attempts to disenfranchise Indian voters occurred during the 2008 Arizona election when the candidacies of Navajo candidates were challenged because the addresses on the signature petitions included post office boxes and not physical addresses, an impossible task for reservation residents who do not have physical addresses.

Section 5 coverage should have ended disenfranchisement of Indian voters in covered jurisdictions; however, South Dakota failed to preclear voting changes in violation of Section 5.[91] Despite Section 5's requirement that Todd and Shannon Counties submit election changes for preclearance, South Dakota ignored the requirement for a quarter of a century until tribal members from Todd and Shannon Counties filed a lawsuit to force compliance in 2002.[92] In 2002, *Quick Bear Quiver v. Nelson* was resolved by entering into a consent decree, but South Dakota continued to violate the preclearance requirements and *Quiver* Plaintiffs returned to court in 2005 to enforce the consent order.

In 2005, South Dakota passed a law allowing counties to redraw county commissioner districts more than once per decade and the law was immediately implemented without preclearance.[93] Pursuant

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[91] *Quick Bear Quiver v. Nelson*, 387 F. Supp. 1027, 1028 (D. S.D. 2005).

[92] *Id*. at 1028.

[93] *Id*.

to the consent decree, the state submitted 714 statutes and 545 administrative rules for preclearance by April 2005.[94]

Litigation to enforce voting rights is not an effective alternative to Section 5 coverage. Litigation is not quick, easy, or cost-efficient. Tribes cannot afford to challenge every law that impacts Indian voting rights.[95] American Indians challenged an Arizona voter identification law in 2006, but trial on the issue was not scheduled in time to affect the 2008 Presidential Primary Elections.

C. Section 5 Preclearance Continues to Protect American Indian Voters.

The House Committee heard "[t]estimony from many outside groups confirm[ing] the importance of Section 5's enforcement mechanisms, especially in protecting smaller, more rural communities within covered states, where Federal oversight has been limited and non-compliance extensive."[96] Testimony provided examples of on-going discrimination in Indian Country.[97] In 2006, the Eighth Circuit Court of

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[94] *Id.*

[95] *To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 715 (2005) (statement of O.J. Semans).

[96] H.R. REP. NO. 109-478, at 43 (2006).

[97] *Continuing Need for Section 203's Provisions for Limited English Proficient Voters: Hearing Before the S. Comm. on the*

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Appeals found that the city of Martin, South Dakota "has been the focus of racial tension between Native Americans and whites" for over a decade.[98]

The history of discrimination and ongoing discrimination in voting demonstrates a need for the continuation of Section 5.[99] The National Commission on the Voting Rights Act investigated the way in which the federal government and citizens employed the Voting Rights Act in order to combat racial discrimination with regard to voting. The study found that since 1982, the Justice Department had sent out 626 letters objecting to proposed election changes in Section 5 covered jurisdictions, because those changes would have a discriminatory effect. The changes sought by "covered jurisdictions were calculated decisions to keep minority voters from fully participating in the political process."[100]

Because covered jurisdictions must submit proposed changes for approval prior to implementation,

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Judiciary, 109th Cong. 500-501 (2006) (statement of Alfred Yazzie); *Voting Rights Act: Evidence of Continued Need, Vol. I and Vol. II, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 1363-1453, 1986-2029 (2006) (appendix to the statement of Wade Henderson).

[98] *Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 242 (2006) (statement of Laughlin McDonald).

[99] *Id*.

[100] H.R. REP. NO. 109-478, at 21.

Section 5 deters covered jurisdictions from discriminating.[101] If not for the temporary provisions of the Voting Rights Act, gains would not have been made. Section 5 is needed to protect American Indians in covered jurisdictions.[102]

IV. REAUTHORIZATION IS SUPPORTED BY THE RECORD AND A VALID EXERCISE OF CONGRESSIONAL POWER.

Reauthorization of Section 5 of the Voting Rights Act is a valid exercise of Congressional powers to enforce the Fourteenth and Fifteenth Amendments to the United States Constitutions. In reauthorizing Section 5 of the Voting Rights Act, Congress received evidence of ongoing discrimination. Congress was not willing to jeopardize forty years of progress especially in the face of the evidence of discrimination compiled by the record.[103] "With more and more Indian people

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[101] *Voting Rights Act: The Continuing Need for Section 5: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 109th Cong. 6 (2005) (statement of Laughlin McDonald).

[102] *Voting Rights Act: Evidence of Continued Need, Vol. I: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 74-75, 218-220 (2006) (appendix to the statements of the Hon. Bill L. Lee and the Hon. Joe Rogers).

[103] *See generally*, S. REP. NO. 109-259 (2006).

participating in elections for the first time,"[104] Section 5 preclearance provisions play an important role in ensuring access to the ballot. This case should be resolved with a ruling in Appellees' favor, because reauthorizing Section 5 of the Voting Rights Act is supported by the Congressional Record and is a valid exercise of Congressional enforcement powers.

[104] *Continuing Need for Section 203's Provisions for Limited English Proficient Voters: Hearing Before the S. Comm. on the Judiciary,* 109th Cong. 310 (2006) (letter by Joe Garcia, NCAI).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

MARVIN S. COHEN,
Counsel of Record
JUDITH M. DWORKIN
SACKS TIERNEY P.A.
4250 North Drinkwater Blvd.
Fourth Floor
Scottsdale, AZ 85284
(480) 425-2600

Counsel for Amici Curiae

PATRICIA A. FERGUSON-BOHNEE
INDIAN LEGAL CLINIC
SANDRA DAY O'CONNOR
COLLEGE OF LAW
P. O. Box 877906
Tempe, AZ 85251
(480) 727-0420

Counsel for Amici Curiae

LOUIS DENETSOSIE,
Attorney General
NAVAJO NATION DEPARTMENT
OF JUSTICE
P. O. Box 2010
Window Rock, AZ 86515
(928) 871-2675

Counsel for Amicus Curiae
Navajo Nation